

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act	)	
of 1996	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

**Comments of the  
Indiana Utility Regulatory Commission**

**Indiana Utility Regulatory Commission**

William D. McCarty, Chairman  
David W. Hadley, Commissioner  
Judith G. Ripley, Commissioner  
Camie J. Swanson-Hull, Commissioner  
David E. Ziegner, Commissioner

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act	)	
of 1996	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

**Comments of the  
Indiana Utility Regulatory Commission**

**1. Introduction**

On December 20, 2001, the Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking (NPRM) in this proceeding. This NPRM begins an examination of the FCC's approach to unbundled network elements (UNEs)<sup>1</sup>, and the circumstances under which incumbent LECs (ILECs) must make UNEs available to requesting carriers pursuant to sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 (TA96). This NPRM, one of several related proceedings<sup>2</sup>

seeks comment on all aspects of the [FCC]'s unbundling framework. In particular, the NPRM seeks comment on the goals of the Act that should play a role in shaping unbundling policy, such as broadband deployment, investment in

---

<sup>1</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3766, para. 151 & n.269 (1999) (*UNE Remand Order*).

<sup>2</sup> *See Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, FCC No. 01-331, Notice of Proposed Rulemaking (rel. Nov. 19, 2001) (*UNE Measurements and Standards Notice*). We also adopted a similar notice regarding incumbent LECs' provisioning of special access services, which also serve as inputs for carriers seeking to provide competitive telephony services. *See Performance Measurements and Standards for Interstate Special Access Services, et al.*, Notice of Proposed Rulemaking, CC Docket No. 01-321, FCC No. 01-339 (rel. Nov. 19, 2001) (*Special Access Measurements and Standards Notice*).

facilities, and others. The NPRM seeks comment on how the [FCC] could apply its unbundling analysis in a more sophisticated manner, by considering whether the unbundling rules should vary by type of service, facility, geography, or other factors. The NPRM then seeks comment on applying the unbundling approach to specific elements and resolving certain existing disputes or ambiguities in the unbundling rules. The NPRM also seeks comment on the proper role of the states, and how best to implement any new rules.”<sup>3</sup>

The Indiana Utility Regulatory Commission (IURC) submits these comments on several sections of the NPRM. First, the FCC should continue to identify a minimum set of network elements that must be unbundled on a national basis, while continuing to allow the state commissions to create and implement additional unbundling requirements that exceed those established by the FCC so long as the state requirements meet the requirements of section 251. Second, the IURC recommends that the FCC take no action to inhibit competitive growth based on type of service, facility, or other factors. Unbundling rules must continue to encourage effective competition for voice and broadband expansion, whether using pure facilities-based or UNE-based approaches (including both UNEs and combinations) to opening markets.

## **2. Discussion**

***Scope and Purpose of the FCC’s Proceeding:*** The FCC stated that, in this NPRM, it will “expressly focus on the facilities used to provide broadband services and explore the role that wireless and cable companies have begun to play and will continue to play both in the market for broadband services and the market for telephony services generally.” (Para. 3.) This focus is based on a particular way of viewing and measuring competition, often referred to as either “intermodal” or “interindustry” competition. Essentially, this philosophical approach assumes that the ILECs’ main competitive threat comes not from CLECs but from other types of providers, such as cable television companies, satellite providers, wireless providers, and advanced services providers. Those who advocate a focus on intermodal or interindustry competition typically also argue for deregulation of the ILECs or, at a minimum, for very loose regulation.

---

<sup>3</sup> *In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Para 90 (FCC 01-361 Rel. Dec. 20, 2001) (Notice of Proposed Rulemaking) [*hereinafter*, *FCC UNE Triennial Review NPRM*].

The NPRM identifies three modes of entry contemplated in TA-96: “through resale of tariffed incumbent LEC services, use of UNEs, and construction of new facilities.” “We are, therefore, statutorily bound to require incumbents to permit both facilities-based and non-facilities-based entry. With respect to facilities-based entry, we seek to promote entry not only by fully facilities-based carriers but also by those facilities-based carriers that purchase actual UNEs, such as the loop” [emphasis added]. (Para. 3).

The reference to “actual UNEs” appears to represent a significant policy shift to eliminate, or sharply limit, the availability of UNE-P, EELS, and other combinations that are critical to the ability of many CLECs to compete against large ILECs. The omission of switching and transport from the list of “actual UNEs,” if implemented as policy, would further harm the CLECs that must rely on ILEC switching or transport (including switching or transport provided directly by the ILEC and by successor or assign affiliates or Section 272 affiliates). Eliminating or limiting the availability of certain UNEs and combinations could force CLECs to duplicate many ILEC facilities, plant, or equipment. This forced duplication could be costly and inefficient. Competition would be delayed considerably in Indiana, due to limited access to capital and limited construction budgets for many CLECs, and the sheer amount of time it would take for CLECs to replicate many of the ILECs’ network components. Over time, the IURC expects that some CLECs will build out their own networks, when and where it is feasible to do so. In the mean time, however, it is critical that the FCC not lose sight of the CLECs’ dependence on the ILECs or arbitrarily reduces their competitive options.

The IURC is very concerned that Paragraph 3 of the NPRM, if carried to fruition, will become a self-fulfilling prophecy. By assuming that the ILECs are not threatened by CLECs and need to be relieved of their obligations toward CLECs, the FCC’s proposed policies will likely lead to even greater market share for the ILECs, further financial hardship for the CLECs, and may ultimately lead to interindustry or intermodal consolidation in favor of the ILECs, as well. These outcomes would have serious anticompetitive effects in many Indiana markets and would reduce the already low level of competition that ILECs generally face in Indiana (as discussed

later in our comments). What little marketplace discipline exists in many ILEC markets could be sharply curtailed.

As Ameritech Indiana has not yet applied for Section 271 authority, the elimination of many important market-opening tools even before the IURC or the FCC has determined that the Company has sufficiently opened its markets could set the IURC's pro-competitive efforts back significantly. The FCC should not consider removing or reducing the UNE obligations of any RBOC in any state in which the RBOC has not yet received Section 271 authority. Even after such authority is granted, the FCC should only consider removing or reducing the UNE obligations (including obligations for both UNEs and combinations) of an RBOC in that state after both the FCC and the affected state commission determine that this would be in the public interest and consistent with applicable federal and state law and policy frameworks.

***The Role of the States In Unbundling Decisions***<sup>4</sup>: The Indiana Utility Regulatory Commission respectfully submits to the FCC that the framework for broader UNE-based competition is just now entering a critical period of development in Indiana and it is therefore important that the FCC take no action that restricts the ability of the IURC to add elements as appropriate. We therefore urge the FCC to recognize that states may continue to require additional unbundling beyond that required by the FCC's national minimum. Such additional unbundling is consistent with the purposes of the federal Telecommunications Act of 1996. We agree with NARUC's request that the FCC "immediately convene a § 410(b) Federal-State Joint Conference to facilitate, inform and coordinate its implementation of the three-year UNE review."<sup>5</sup> We also agree with NARUC that the issues to be addressed in the triennial review are "intensively fact- and state-specific" in nature. Accordingly, the Joint Conference should prepare its own recommendations to the FCC and should also facilitate the independent submission by state regulators of written statements or formal comments to the FCC on these critical issues. The FCC should not implement any changes to its rules for UNEs and combinations before it receives substantial, meaningful input from the states, including the

---

<sup>4</sup> *FCC UNE Triennial Review NPRM*, Paras. 75, 76 (FCC 01-361) (Rel. Dec. 20, 2001).

<sup>5</sup> *FCC UNE Triennial Review NPRM* (FCC 01-361) (Rel. Dec. 20, 2001), Initial Comments of the National Association of Regulatory Utility Commissioners, at 5 (filed April 5, 2002).

recommendations of the Federal-State Joint Conference and the statements and additional comments from individual states (if any). The IURC believes that proactive cooperation between the FCC and the states is essential to developing a sound public policy on UNEs and combinations. The need for cooperation is more than just a good idea. As NARUC observed, “[G]iven the Act’s purpose to ensure that the UNE regime will promote competition for local telecommunications services, the direct involvement of state regulators with jurisdiction over such local services seems indispensable to any meaningful three-year UNE review.”<sup>6</sup> Such direct involvement by state regulators is consistent with Congressional intent, as set forth in Sections 251(d)(3) and 261 of TA-96, and with the FCC’s prior findings that “§ 251(d)(3) provides state commissions with the ability to establish additional unbundling obligations.”<sup>7</sup> Furthermore, because the revenues and costs for UNEs are not currently subject to the jurisdictional separations process in Part 36, the states (as well as the FCC) have both a right and an obligation to participate in developing the policies and requirements for UNEs and combinations.<sup>8</sup>

***Low Levels of Competitive Voice and Broadband Service Penetration in Indiana:*** The IURC has active proceedings on UNEs for SBC/Ameritech and Verizon/GTE, and an active 271/OSS proceeding for SBC/Ameritech. It may be some time before appreciable or measurable market changes can be analyzed. The Telecommunications Act of 1996 was enacted over six years ago, and the UNE Remand Order was issued almost two and one-half years ago, however, the market-opening expectations have not been met, as evidenced by low levels of market growth by the new entrants. The FCC’s recently released data on local telephone competition<sup>9</sup> shows in Indiana that only 5% (180,221 of 3,576,710) end-user switched access lines are provided by CLECs, and CLECs provide fewer than 40,000 lines to small business and residential customers.<sup>10</sup> In Indiana, according to the FCC’s report, households in 56% of all zip

---

<sup>6</sup> *Id.*

<sup>7</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3936, 3766-7 at ¶¶ 153, 154 (rel. Nov. 5, 1999) (“UNE Remand Order”).

<sup>8</sup> The IURC is not making any specific findings, determinations, or recommendations regarding the separations issues associated with UNEs and combinations in these comments.

<sup>9</sup> *Local Telephone Competition: Status as of June 30, 2001*. Industry Analysis Division, Common Carrier Bureau, February 2002. Table 6.

<sup>10</sup> *Ibid.* Table 9.

codes do not have a CLEC alternative for basic local exchange service.<sup>11</sup> Not enough has changed in the marketplace, and any growth trajectory that has been observed might not be sustainable, given the upheaval in the CLEC industry in 2000 and 2001, and that continues to this day. As we have noted elsewhere:

In Indiana, as in many other states, the level of competition for local and advanced telecommunications services is not as great as was envisioned following the passage of TA96. As the data in the report show, competitive choice is slowly growing for business customers in major metropolitan areas. Few residential users, especially in rural areas, have selected carriers other than the ILECs. A partial list of factors for the level of competition includes: unrealistic expectations of CLEC capabilities, bankruptcies and the near collapse of telecom sector financials, the soundness of CLEC business plans, demographic factors such as population density, availability of suitable network element pricing, and proven Operating Support Systems between Incumbent LEC and Competitive LECs.<sup>12</sup>

While many ILECS have developed CLEC subsidiaries, few of the large ILECs such as SBC, Bell South, Verizon, Sprint or QWEST, have credibly entered one another's territory to compete for local exchange or residential broadband service. It may be argued that other forms of competition, such as wireless, threaten ILECs in the delivery of voice or broadband access, however the two largest ILECs in Indiana each have substantial wireless affiliates: Verizon Wireless and Cingular, which is 60% owned by Ameritech Indiana's parent, SBC. Wireless ownership by ILECs or their parent corporations, the existence of subsidiaries delivering data services and Internet gateway services (Internet Service Providers - ISPs) are indicators that the ILECs are influential players in intermodal facilities as well. The IURC urges the FCC to take special notice of joint marketing efforts between affiliates (such as was permitted between the SBC/Ameritech operating companies and the SBC/Ameritech advanced services affiliate under the FCC's merger conditions) and possible cannibalization of ILEC customers by wireless affiliates. Indeed, the parent corporations may actually benefit from – and may have incentives to encourage – such cannibalization, so long as the revenue per customer increases. Thus, claims of intermodal local exchange competition must be scrutinized carefully, and any “competition”

---

<sup>11</sup> *Ibid.* Table 13.

<sup>12</sup> *Telephone Report to the Regulatory Flexibility Committee of the Indiana General Assembly*. August 2001, by the Indiana Utility Regulatory Commission, p.4. <http://www.in.gov/iurc/issues/regflex/index.html>

from affiliates or subsidiaries must be removed from the data and statistics on competition to obtain a more realistic view of the true competitive threat facing the ILECs.

***Few Alternatives to ILEC Networks Have Developed in Indiana:*** While the IURC Annual Telephone Survey is patterned on the FCC Survey and both show that the ILECs remain dominant in both business and residential access lines provided, whether through resale, UNEs or pure facilities-based service. UNE docket proceedings in Indiana are just starting phase two, with orders having been issued in Cause No. 40611-S1<sup>13</sup> and 40618-S1.<sup>14</sup> The combined factors of the low levels of competitive market share and the early stages of UNE competition indicate that it is premature to make modifications to either the unbundling requirements or the non-discriminatory access requirements established in related proceedings of the FCC. By limiting unbundling and nondiscrimination obligations before effective substitutes have developed, before the CLECs have sufficient market share to impose meaningful, sustainable market discipline, and before Ameritech receives Section 271 approval for Indiana, the FCC risks impeding competition, particularly for voice and broadband services.

***Encouraging Facilities Investment and Broadband Deployment***<sup>15</sup>: The FCC seeks comment on whether and to what extent our unbundling analysis should expressly consider the Act's goal of encouraging the deployment of advanced telecommunications capability. More specifically, Congress declared that encouraging the provision of new services and technologies to the public is a policy of the United States,<sup>16</sup> and in section 706 of the 1996 Act provided specific direction to the Commission to:

encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and

---

<sup>13</sup> *IURC INVESTIGATION AND GENERIC PROCEEDING ON AMERITECH INDIANA'S RATES FOR INTERCONNECTION, SERVICE, UNBUNDLED ELEMENTS, AND TRANSPORT AND TERMINATION UNDER THE TELECOMMUNICATIONS ACT OF 1996 AND RELATED INDIANA STATUTES*. Cause No. 40611-S1, Order issued March 28, 2002.

<sup>14</sup> *IURC INVESTIGATION AND GENERIC PROCEEDING ON GTE'S RATES FOR INTERCONNECTION SERVICES UNBUNDLED ELEMENTS, TRANSPORT AND TERMINATION UNDER THE TELECOMMUNICATIONS ACT OF 1996 AND RELATED INDIANA STATUTES*. Cause No. 40618-S1, Order issued February 27, 2002.

<sup>15</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, paras. 22-25.

<sup>16</sup> 47 U.S.C. § 157(a).



secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment.<sup>17</sup>

The IURC believes that effective competition can only be achieved in the foreseeable future through use of ILEC facilities that must be made available to competitors (through the so-called “intramodal competition”). Any broadband competition facing ILECs from providers other than CLECs should not be viewed as justification to lessen the competitive opportunities for CLECs. Claims of intermodal competition for the provision of broadband or advanced services must be scrutinized carefully, and any “competition” from affiliates or subsidiaries must be removed from the data and statistics on competition to obtain a more realistic view of the true competitive threat facing the ILECs in the provision of broadband and advanced services.

The recent FCC report on high speed internet access subscribership<sup>18</sup> indicated that only 17 providers of high speed Internet access service, whether intermodal or intramodal, exist in Indiana and that number is growing; however, only 80,364 high speed access lines are in use<sup>19</sup>, which is a minute percentage used by the population of over 6,000,000 citizens in 2,336,000 households. However, many recent reports have indicated that any lag in making broadband and advanced services available on a widespread basis is due to a lack of demand and high prices, rather than to restrictions in supply. To the extent that supply restrictions do exist, the IURC recommends that the FCC actively encourage, not discourage, CLECs’ ability to compete against the ILECs.

### **3. Summary**

The FCC and state commissions must continue to promote entry by those carriers that purchase UNEs such as the loop, switch, or transport; or combinations, such as the UNE Platform (UNE-P) and EELS. A policy that relies exclusively on pure facilities-based entry

---

<sup>17</sup> Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157 (47 U.S.C. § 157 nt).

<sup>18</sup> *High-Speed Services for Internet Access: Subscribership as of June 30, 2001*. Table 6.

<sup>19</sup> *Ibid.* Table 7.

is contrary to law, ignores the lessons of history, and will facilitate and likely increase ILEC dominance of the markets they serve. A policy that deliberately favors pure facilities-based entry and maintains only a limited set of UNEs or combinations solely, or primarily, to meet the letter of the law, may suffer from many of the same defects. Plainly stated, we argue for comprehensive federal standards that would serve as a floor for the ILECs' statutory unbundling obligations, while allowing each state commission to consider the level of local competition in each State and make analyses to determine which additional network elements (if any) should be unbundled and which combinations should be provided according to the conditions in each state. State commissions are in an excellent position to consider relevant factors, including the level of competition presumed by that state's system of regulation. We agree with NARUC's request that the FCC "immediately convene a § 410(b) Federal-State Joint Conference to facilitate, inform and coordinate its implementation of the three-year UNE review."<sup>20</sup> Individual state commissions should be permitted to file statements and additional comments on the recommendations from the Joint Conference, and on any Notices of Proposed Rulemaking, Further Notices of Proposed Rulemaking, or Orders that might follow from, or be based upon, the recommendations or reports of the Joint Conference. However, we reiterate our view that the FCC should not consider removing or reducing the obligations to provide access to unbundled network elements and combinations of any RBOC in any state in which the RBOC has not yet received Section 271 authority. Even after such authority is granted, the FCC should only consider removing or reducing the UNE and combination obligations of an RBOC in that state after both the FCC and the affected state commission determine that this would be in the public interest and consistent with applicable federal and state law and policy frameworks.

---

<sup>20</sup> *FCC UNE Triennial Review NPRM* (FCC 01-361) (Rel. Dec. 20, 2001) Initial Comments of the National Association of Regulatory Utility Commissioners, at 4, 5 (filed April 5, 2002).

Respectfully submitted,

Indiana Utility Regulatory Commission

---

William D. McCarty, Chairman

---

David W. Hadley, Commissioner

---

Judith G. Ripley, Commissioner

---

Camie J. Swanson-Hull, Commissioner

---

David E. Ziegner, Commissioner

302 West Washington Street, Suite E 306  
Indianapolis, Indiana 46204